

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TEXARKANA DIVISION**

RODERICK TYRONE THURMAN,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

§
§
§
§
§
§
§
§
§

CIVIL ACTION NO. 5:16-CV-00105-RWS

**MEMORANDUM ORDER ADOPTING THE MAGISTRATE
JUDGE'S REPORT AND RECOMMENDATION**

Movant Roderick Tyrone Thurman, a federal prisoner, proceeding *pro se*, filed this motion to vacate, set aside or correct sentence pursuant to 28 U.S.C. § 2255.

The Court referred this matter to the Honorable Caroline M. Craven, United States Magistrate Judge, at Texarkana, Texas, for consideration pursuant to applicable laws and orders of this Court. The Court has received and considered the Report and Recommendation of United States Magistrate Judge (Docket No. 7) along with the record, pleadings and all available evidence. The Magistrate Judge recommends the motion to vacate, set aside or correct sentence should be denied. The Magistrate Judge also recommends amending the sentencing hearing minutes to reflect that Mr. Thurman's objections to the Presentence Report were granted, and that he was sentenced in accordance with Paragraph 75 of the Presentence Report.

No objections to the Report and Recommendation have been filed.¹ Therefore, the Court

¹ The Report and Recommendation was mailed to Mr. Thurman's last known address on October 23, 2017. Mr. Thurman is a *pro se* litigant, and, under the Local Rules of the Eastern District of Texas, *pro se* litigants must provide the Court with a physical address and are responsible for keeping the clerk advised in writing of the current address. Local Rule CV-11(d). To date, Mr. Thurman has not acknowledged receipt of the Report and Recommendation. A member of the Court staff searched the Bureau of Prisons' inmate locator, which reflects that Mr. Thurman was released from custody on April 18, 2017. No forwarding address has been provided.

reviews the Magistrate Judge's findings of fact and conclusions of law for plain error. *Rodriguez v. Bowen*, 857 F.2d 276, 276–77 (5th Cir. 1988).

The Court agrees with the Magistrate Judge' findings and conclusions. Mr. Thurman's sentence was not enhanced pursuant to the career offender provision of the United States Sentencing Guidelines, and therefore, is not entitled to relief under *Johnson v. United States*, 135 S. Ct. 2551 (2015). The Court further agrees that the sentencing minutes should be amended.

Additionally, in this case, the movant is not entitled to the issuance of a certificate of appealability. An appeal from a judgment denying federal habeas corpus relief may not proceed unless a judge issues a certificate of appealability. *See* 28 U.S.C. § 2253; FED. R. APP. P. 22(b). The standard for granting a certificate of appealability, like that for granting a certificate of probable cause to appeal under prior law, requires the movant to make a substantial showing of the denial of a federal constitutional right. *See Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000); *Elizalde v. Dretke*, 362 F.3d 323, 328 (5th Cir. 2004); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1982). In making that substantial showing, the movant need not establish that he should prevail on the merits. Rather, he must demonstrate that the issues are subject to debate among jurists of reason, that a court could resolve the issues in a different manner, or that the questions presented are worthy of encouragement to proceed further. *See Slack*, 529 U.S. at 483-84; *Avila v. Quarterman*, 560 F.3d 299, 304 (5th Cir. 2009). If the motion was denied on procedural grounds, the movant must show that jurists of reason would find it debatable: (1) whether the motion raises a valid claim of the denial of a constitutional right, and (2) whether the district court was correct in its procedural ruling. *Slack*, 529 U.S. at 484; *Elizalde*, 362 F.3d at 328. Any doubt regarding whether to grant a certificate of appealability is resolved in favor of the

movant, and the severity of the penalty may be considered in making this determination. *See Miller v. Johnson*, 200 F.3d 274, 280-81 (5th Cir. 2000).


The movant has not shown that any of the issues raised by his claims are subject to debate among jurists of reason, or that a procedural ruling was incorrect. In addition, the questions presented are not worthy of encouragement to proceed further. The movant has failed to make a sufficient showing to merit the issuance of a certificate of appealability.

Accordingly, finding no plain error in the findings of fact and conclusions of law of the Magistrate Judge, the Court **ADOPTS** the Report and Recommendation of the Magistrate Judge (Docket No. 7) as the findings and conclusions of this Court. It is thereby **ORDERED** that Mr. Thurman's motion is **DENIED**.

The Court further **AMENDS** the sentencing hearing minutes to reflect that Mr. Thurman's objections to the Presentence Report were granted, and that Mr. Thurman was sentenced in accordance with Paragraph 75 of the Presentence Report. *See* 5:13-cr-00008-RWS-CMC-1, Docket No. 47.

A final judgment will be entered in this case in accordance with the above. A certificate of appealability will not be issued.

SIGNED this 9th day of January, 2018.


ROBERT W. SCHROEDER III
UNITED STATES DISTRICT JUDGE